No. 76-1143

In the Supreme Court of the United States

OCTOBER TERM, 1976

RAY MARSHALL, SECRETARY OF LABOR, ET AL.,
APPELLANTS

v.

BARLOW'S, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

JURISDICTIONAL STATEMENT

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OPINION BELOW

The opinion of the three-judge district court (App. A, *infra*) is not yet officially reported. It is unofficially reported at 4 BNA OSHC 1887 and 3 CCH ESHG Para. 21,418.

JURISDICTION

The judgment of the district court declaring Section 8(a) of the Occupational Safety and Health Act

of 1970, 84 Stat. 1598, 29 U.S.C. 657(a), unconstitutional and enjoining the Secretary from acting pursuant to that Section was entered on December 30, 1976 (App. B, *infra*). A notice of appeal to this Court (App. C, *infra*) was filed on January 4, 1977. The jurisdiction of this Court rests on 28 U.S.C. 1252 and 1253.[1]

QUESTIONS PRESENTED

1. Whether the inspection provisions of the Occupational Safety and Health Act of 1970, 29 U.S.C. 657(a), and their implementing regulations, violate the Fourth Amendment insofar as they authorize representatives of the Secretary of Labor to inspect without a warrant at reasonable times commercial premises routinely occupied by an employer's work force.

2. Whether, in any event, the district court should have upheld the constitutionality of the statute by interpreting it to meet Fourth Amendment requirements, instead of holding the statute unconstitutional and enjoining its enforcement.

STATUTE INVOLVED

Section 8(a) of the Occupational Safety and Health Act of 1970, 84 Stat. 1598, 29 U.S.C. 657(a), provides:

[1] Because the action was commenced on January 6, 1976, the three-judge court had jurisdiction to consider appellee's constitutional claims (see Section 7 of Pub. L. 94-381, 90 Stat. 1119, 1120).

In order to carry out the purposes of this Act, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—

(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent, or employee.

STATEMENT

1. The Occupational Safety and Health Act of 1970 (OSHA), 84 Stat. 1590, 29 U.S.C. 651 *et seq.*, was enacted "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. 651.[2] As we explained in our

[2] The need for the Act is explained in S. Rep. No. 91-1282, 91st Cong., 2d Sess. 2-4 (1970); Committee Print, Legislative History of the Occupational Safety and Health Act of 1970, Senate Committee on Labor and Public Welfare, 1st Sess. ("Leg. Hist.") 142-144 (1971):

> The problem of assuring safe and healthful workplaces • • • ranks in importance with any that engages the national attention today. • • • 14,500 persons are killed annually as a result of industrial accidents; • • • during

brief in *Irey* v. *Occupational Safety and Health Review Commission*, No. 75-748, argued November 29, 1976, the Act creates a federal statutory duty to avoid maintaining unsafe or unhealthy working conditions applicable to any non-governmental employer whose business affects commerce. 29 U.S.C. 654(a)(1) and (2); 652 (5).

The Act is administered by the Department of Labor, whose inspectors are authorized to conduct safety and health inspections at places of employment. 29 U.S.C. 657(a). If upon inspection or other investigation the Secretary has cause to believe

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the past four years more Americans have been killed where they work than in the Vietnam war. By the lowest count, 2.2 million persons are disabled on the job each year, resulting in the loss of 250 million man days of work—many times more than are lost through strikes * * * [and] the economic impact of industrial deaths and disability is staggering. Over $1.5 billion is wasted in lost wages, and the annual loss to the Gross National Product is estimated to be over $8 billion. Vast resources that could be available for productive use are siphoned off to pay workmen's compensation benefits and medical expenses. * * * In sum, the chemical and physical hazards which characterize modern industry are not the problem of * * * a single industry, nor a single state jurisdiction. The spread of industry and the mobility of the workforce combine to make the health and safety of the worker truly a national concern.

The House Report (H.R. Rep. No. 91-1291, 91st Cong. 2d Sess. 14 (1970), Leg. Hist. 844) defines occupational health and safety as "the most crucial [issue] in the whole environmental question", and notes that "[t]he on-the-job health and safety crisis is the worst problem confronting [over 80 million] American workers."

that the Act or its implementing regulations have been violated, he is empowered to issue a citation to the employer specifically describing the violation, fixing a reasonable time for its abatement, and (in his discretion) proposing a civil penalty. 29 U.S.C. 658, 659.[3]

The inspections must be made at reasonable times and in a reasonable manner, and must be limited to the scope necessary to identify occupational hazards (29 U.S.C. 657(a)). Upon presenting his credentials

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[3] The amount of the proposed penalty "if any" (29 U.S.C. 659(a)) depends on the severity of the hazard and the cited employer's past diligence in attempting to discover and correct it (*ibid.*, see 29 U.S.C. 666(i) and (j)). The prospect of such penalties is designed to promote voluntary compliance by employers before any inspector arrives. 29 U.S.C. 651(1); see Leg. Hist. 463-464, 470 (Sen. Javits), 471-472 (Sen. Dominick), 853; *Brennan* v. *Occupational Safety and Health Review Commission*, 487 F. 2d 438, 441, 443 (C.A. 8). Cf. *National Independent Coal Operators' Association* v. *Kleppe*, 423 U.S. 388, 401. Such proposed penalties may range up to $1,000 for serious violations, and to a maximum of $10,000 for willful or repeated violations. 29 U.S.C. 658(a), 659(a), 666(a)-(c) and (j). The Secretary may also propose a civil penalty of not more than $1,000 per day of nonabatement where subsequent inspection reveals noncompliance with a final agency order, 29 U.S.C. 659(b), 666(d), and may seek temporary injunctions in federal district court to correct imminent dangers before administrative enforcement would result in their abatement. 29 U.S.C. 662. Finally, in cases of willful violations that cause employee death, the Secretary is authorized to refer the matter to the Department of Justice for criminal prosecution, which may result in a maximum sentence of six months' imprisonment and a $10,000 fine. 29 U.S.C. 666(e). However, of approximately 400,000 inspections conducted since the Act's April 1971 effective date, only 5 have resulted in criminal prosecution.

to the employer or agent in charge,[4] the inspector is entitled to immediate entry to any premises where work is performed by employees of the employer (29 U.S.C. 657(a)); advance notice of the inspection is prohibited (29 U.S.C. 666(f); 651(10)). The employer is entitled to accompany the inspector during his tour of the relevant premises, and may raise privacy or other objections to the conduct of the inspection. 29 U.S.C. 657(e); see 29 C.F.R. 1903.4, 1903.7(e), 1903.8.[5]

The statute provides no sanctions for refusals to permit inspections. In implementing the statute, the Secretary has promulgated a regulation requiring the inspector to seek a court order authorizing entry if the employer refuses to consent to the inspection (29 C.F.R. 1903.4).

2. Appellee Barlow operates an electrical, plumbing, and heating-air conditioning installation business in Pocatello, Idaho. At 11 a.m. on September 11, 1975, an OSHA inspector arrived at Barlow's to

[4] These credentials paraphrase and cite the statutory authority to inspect. See *Usery* v. *Godfrey Brake and Supply Service*, C.A. 8, No. 76-1247, slip op. 2, 5 (November 19, 1966). Inspectors may offer toll-free verifying calls to their area offices if these credentials do not convince employers of the propriety of the inspection. *Ibid.* Agency regulations also require that the inspector explain the nature, purpose and scope of the proposed inspection. 29 C.F.R. 1903.7(a).

[5] Trade secrets and other compelling privacy interests of the employer are explicitly protected. 29 U.S.C. 664-665; 29 C.F.R. 1903.9.

make a routine inspection of its work areas,[6] presented his credentials, explained his mission to the company's president, and was denied entry because he did not have a search warrant. After notice and hearing on December 30, 1975, the Secretary obtained a district court order authorizing the entry for inspection purposes (App. A, *infra*, pp. 1a-2a).

On January 5, 1976, the inspector returned to Barlow's and requested permission to inspect based on this order. Permission was again denied, and the next day the appellee filed a complaint alleging that 29 U.S.C. 657(a) is inconsistent with the Fourth Amendment, and seeking temporary and permanent injunctions against OSHA inspections. On January 15, 1976, a single judge denied Barlow's requests for preliminary relief (App. A, *infra*, p. 3a).

A three-judge court was convened, and on December 30, 1976, it concluded that 29 U.S.C. 657(a) is "unconstitutional and void", relying on *Camara* v. *Municipal Court*, 387 U.S. 523, and *See* v. *City of Seattle*, 387 U.S. 541. The court permanently enjoined the Secretary from conducting safety inspections pursuant to 29 U.S.C. 657(a) to enforce OSHA, and specifically from inspecting appellee's premises.[7]

[6] The inspection was a "general schedule" investigation—it was not based on any employee complaint, history of employer noncompliance, or other reason to believe a violation was occurring at that particular place of business (App. A, *infra*, p. 2a).

[7] On February 3, 1977, Mr. Justice Rehnquist stayed the district court's order "except at it applies to appellee Barlow's, Inc.," until final disposition of this case.

THE QUESTIONS ARE SUBSTANTIAL

1. The decision below, if permitted to stand, would seriously impair effective implementation of federal legislation designed to protect the health and safety of the Nation's workforce. The decision is not required by this Court's decisions applying the Fourth Amendment to administrative inspections; indeed, it is inconsistent with the rationale of *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72, and *United States* v. *Biswell*, 406 U.S. 311, which dealt with closely similar Fourth Amendment issues.

Without the ability to make the unannounced visits the Act contemplates,[8] the Secretary cannot effectively implement OSHA by identifying and requiring the correction of hazards threatening employees.[9] In

[8] Congress intended the Secretary to enter and inspect work places without a warrant. See S. Rep. No. 91-1282, *supra*, at 11 (Leg. Hist. 151):

> In order to carry out an effective national occupational safety and health program, it is necessary for government personnel to have the right of entry in order to ascertain the safety and health conditions and status of compliance of any covered employment establishment. Section 8(a) therefore authorizes the Secretary or his representative, upon presenting appropriate credentials, to enter at reasonable times the premises of any place of employment * * * to inspect and investigate within reasonable limits all pertinent conditions * * *.

H.R. Rep. No. 91-1291, 91st Cong., 2d Sess. 22 (1970) (Leg. Hist. 852), is to the same effect.

[9] In addition to routine random inspections, inspections are undertaken to confirm worker complaints of imminent dangers or other hazards, 29 U.S.C. 657(f), 662; investigate job-

addition, the constant possibility of such inspections and the knowledge that violations discovered by the inspectors may lead to monetary sanctions are essential to secure the broad voluntary compliance on which the program depends.[10] Congress recognized that workplace hazards are so pervasive and in the main so transient or easily concealed that unannounced spot checks were needed, since "advance notice to an employer has been a prime cause of the breakdown in * * * enforcement" under other safety statutes (H. R. Rep. No. 91-1291, 91st Cong., 2d Sess. 26127 (1970); Leg. Hist. 856-857). It accordingly specified that the inspection is to be without advance notice (29 U.S.C. 651(10)) and the inspector is authorized to enter the premises to be inspected "without delay" (29 U.S.C. 657(a)).[11]

related fatalities or catastrophes, cf. 29 C.F.R. 1904.8; reinspect workplaces to determine compliance with abatement orders, 29 U.S.C. 659(b), 660(b); and investigate claims that employers have retaliated against workers for exercising their rights under the statute. 29 U.S.C. 660(c).

[10] See, *e.g.*, 29 U.S.C. 659(a) and (b); *Usery* v. *Godfrey Brake and Supply Service*, C.A. 8, No. 76-1247, slip op. 6-7 (decided November 19, 1976); *Dunlop* v. *Rockwell International*, 540 F. 2d 1283, 1292 (C.A. 6); *Brennan* v. *Occupational Safety and Health Review Commission*, 487 F. 2d 438, 441, 443 (C.A. 8). Cf. *National Independent Coal Operators' Association* v. *Kleppe*, 423 U.S. 388, 401; *Godwin* v. *Occupational Safety and Health Review Commission*, 540 F. 2d 1013, 1016 (C.A. 9).

[11] Congress was also sensitive to the interests of the employers; it provided significant safeguards to assure that the interference with their operations is no greater than the interests protected by the Act require. Thus, the scope of the

A warrant requirement would significantly impede the effectuation of the statute's purpose, whether the warrant need be sought only after access is refused or prior to any attempt to inspect. As this Court noted in *See*, *supra*, 387 U.S. at 545, n. 6, "surprise may often be a crucial aspect of routine inspections of business establishments." Here, in view of the ease with which hazardous working conditions may frequently be temporarily concealed or ameliorated,[12] the effectiveness of the inspection system

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inspection permitted is limited to that necessary to identify occupational hazards, it is to be made during working hours or at other reasonable times (29 U.S.C. 657(a)), and the employer is entitled to notice of the inspector's authority (29 U.S.C. 657(a)) and to protection of his compelling privacy interests (29 U.S.C. 664-665).

[12] For example, employers who have permitted spray-booth ventilating fans designed to remove toxic and flammable substances to become clogged with residues may swiftly restore them to operating condition before allowing them to deteriorate again after inspection. Cf. 29 C.F.R. 1910.107. Employers who have allowed employees to work in unshored trenches, 29 C.F.R. 1926.652(a) and (b), or without protective hard hats, safety belts, respirators, ear plugs, or guard rails, 29 C.F.R. 1910.23, 1910.95(b)(1), 1910.132-.136; 29 C.F.R. 1926.28(a), 1926.104-.105, 1926.500, may quickly require use of such equipment, then rescind or ignore such orders to reduce expenses or increase production. Cf., *e.g.*, *I.T.O. Corp. of New England* v. *Occupational Safety and Health Review Commission*, 540 F. 2d 543 (C.A. 1); *C.N. Flagg & Co.*, OSHRC No. 1734, 11 OSHARC Reports 632, affirmed without opinion, C.A. 2, No. 74-2362 (January 12, 1976). Guards to prevent amputations from work with hazardous machines, *e.g.*, 29 C.F.R. 1910.212, .217, may be turned off or by-passed by foremen or individual operators when they are sure an inspector will not be present—a common production practice noted in the legislative history itself. See, *e.g.*, Leg. Hist. 401-402 (Sen. Saxbe). And since proof of correctible violations *inter alia* requires a showing that workers had access to hazardous machines or areas, *e.g.*, *Brennan* v. *Gilles & Cotting, Inc.*, 504 F. 2d 1255, 1263-1266 (C.A. 4), on remand, 1975-1976 CCH OSHD Para. 20,448 (February 20, 1976) (not yet officially reported), successful enforcement proceedings may be blocked with relative ease by temporarily disconnecting machines or barricading such areas, if advance notice of an inspector's arrival is obtained.

would be largely nullified if an employer could gain significant delay by refusing to permit an inspection without a warrant.[13] This would be particularly true where—as is commonly the case in civil warrant practice—a show cause order issues before compulsory process may be obtained.

The alternative of routinely obtaining *ex parte* warrants before attempting an inspection would also create substantial difficulties. Most employers willingly consent to inspections without a warrant. The Act covers nearly six million workplaces, and the Secretary is currently conducting tens of thousands of inspections yearly with only 1,300 inspectors.[14] In

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[13] Agency regulations currently require the Secretary to obtain a court order authorizing entry if the inspector is initially refused entry. See 29 C.F.R. 1903.4. A ruling by this Court that no warrant is required should greatly reduce an employer's incentive to refuse entry. Moreover, since the district courts are always open for compulsory process purposes, Fed. R. Civ. P. 77(a), and there would ordinarily be no cognizable contention in opposition, orders authorizing entry would issue swiftly and routinely in the event of refusals, further reducing the interim available to employers.

[14] Congress repeatedly indicated awareness that qualified inspectors to enforce this Act would be in critically short

these circumstances, requiring inspectors to obtain a warrant before each inspection would place an unwarranted burden on limited judicial and enforcement resources, creating severe delays in implementing inspections, to the detriment of the Act's basic purpose of assuring the swiftest possible abatement of occupational hazards. See, *e.g.*, *Brennan* v. *Winters Battery Mfg. Co.*, 531 F. 2d 317, 322-323 (C.A. 6), certiorari denied, No. 75-1162 (May 24, 1976).

Moreover, pre-inspection warrants for routine "general schedule" inspections would provide only minimal additional safeguards for an employer's privacy interests. Since the essence of the general schedule inspection is that it is a random spot check, the factors identified in *Camara* v. *Municipal Court*, *supra*, 387 U.S. at 538-539, as supporting a finding of probable cause for inspection would be largely irrelevant. Here, as in *United States* v. *Biswell*, *supra*, 406 U.S. at 316: "if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible." Accord, *Brennan* v. *Buckeye Industries*, 374 F. Supp. 1350, 1354 (S.D. Ga.).[15]

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supply for an indefinite time. *E.g.*, S. Rep. No. 91-1282, *supra*, at 12, 21-22, Leg. Hist. 152, 161-162; H.R. Rep. No. 91-1291, *supra*, at 22-31, Leg. Hist. 852-861; H.R. (Conf. Rep.) Rep. No. 91-1765, 91st Cong., 2d Sess. 37 (1970), Leg. Hist. 1190.

[15] Probable cause for inspections based on fatality reports or employee complaints could be established by submitting to the magistrate the fatality report prepared by the employer (29 C.F.R. 1904.8) or the employee complaint, which must in any event be presented to the employer at the time of

Nothing in the decisions of this Court calls for invalidation of the congressional authorization of warrentless OSHA safety inspections. This Court has consistently recognized that the overriding Fourth Amendment test is one of "reasonableness" in the particular circumstances. *E.g.*, *Roaden* v. *Kentucky*, 413 U.S. 496, 501; *Camara* v. *Municipal Court*, *supra*, 387 U.S. at 538-539. It has noted that congressional determinations regarding the reasonableness of particular intrusions are entitled to weight in this constitutional area, *United States* v. *Watson*, 423 U.S. 411; and it has regularly applied that test's balancing of governmental interests against privacy expectations in deciding whether a warrant is required, as well as in identifying the nature of the probable cause needed to support a warrant authorizing an inspection. *E.g.*, *Camara*, *supra*, 387 U.S. at 533; cf. *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 269-270 (plurality opinion); 277-285 (Powell, J., concurring), 288-290 (White, J., dissenting).

Virtually all the factors the Court has found significant in concluding that statutorily authorized inspections (in contrast to the types of searches and seizures that have been the traditional focus of Fourth Amendment concern) may be conducted without a

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the inspection (29 U.S.C. 657(f)(1)). But the warrant procedure in these cases would provide the employer with no more information concerning the reasonableness of the inspection than he is already provided by statute and regulation. See *United States ex rel. Terraciano* v. *Montanye*, 493 F. 2d 682, 685 (C.A. 2), certiorari denied *sub nom. Terraciano* v. *Smith*, 419 U.S. 875.

warrant [16]—express congressional authorization, compelling governmental need in light of the particular purpose of the inspection involved, the difficulty of making any meaningful "cause" showing, and limited interference with legitimate privacy expectations [17]—

[16] Similar or identical provisions are included in many federal statutes, *e.g.*, 21 U.S.C. 374(a) (Food, Drug, and Cosmetic Act); 30 U.S.C. 723, 724 (Metal and Nonmetallic Mine Safety Act); 30 U.S.C. 813 (Coal Mine Health and Safety Act); 45 U.S.C. 437(c) (Railroad Safety Act); 8 U.S.C. 1225(a) (Immigration and Nationality Act); 29 U.S.C. 211(a) (Fair Labor Standards Act); 7 U.S.C. (Supp. V) 136g (Environmental Pesticide Control Act); 41 U.S.C. 53 (Walsh-Healey Act); 45 U.S.C. 29 (Railroad Safety Appliance Act); 42 U.S.C. 1857f-6 (Air Pollution Control Act); 7 U.S.C. 2146(a) (Animal Welfare Act of 1970); 46 U.S.C. 239, 362, 404 (Bureau of Marine Inspection Act); 21 U.S.C. 1034(a), (b), (d) (Egg Products Inspection Act); 15 U.S.C. 1270(a), (b) (Federal Hazardous Substances Act); 42 U.S.C. 2035(c) (Atomic Energy Act); Section II, Pub. L. 94-469, 90 Stat. 2032, 15 U.S.C. 2610 (Toxic Substances Control Act); 33 U.S.C. (Supp. V) 467(a) (Water Pollution Control Act); 42 U.S.C. 1857c-9 (Clean Air Act); 26 U.S.C. 7606 (Internal Revenue Code of 1954); 26 U.S.C. 5146(b) (Internal Revenue Act of 1958).

[17] The statute is aimed only at business premises, which have "[h]istorically • • • been subject to broad visitorial power, both in England and in this country." *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 204. Moreover, the inspection is designed only to disclose hazardous working conditions—it relates purely to the regulation of business activities. *G. M. Leasing Corp.* v. *United States*, No. 75-235, decided January 12, 1977, slip op. 14-15. And, since OSHA inspectors are only to examine areas where employees work, they "do not • • • intrude into any zone of privacy which the [employers] reasonably expect to remain inviolate." *Youghiogheny and Ohio Coal Co.* v. *Morton*, 364 F. Supp. 45, 51 (S.D. Ohio). Indeed, at least two courts of appeals have suggested that employers' privacy expectations in these circumstances are

are present in this case. *See Colonnade Catering Corp.* v. *United States*, 397 U.S. 72; *United States* v. *Biswell*, 406 U.S. 311.[18] For this reason those federal courts that have attempted to balance the competing interests have sustained limited warrantless inspections under Section 8(a)[19] and analogous regulatory provisions.[20]

so low as to amount to a lack of Fourth Amendment standing. *Bloomfield Mechanical Contracting, Inc.* v. *Occupational Safety and Health Review Commission*, 519 F. 2d 1257, 1263 (C.A. 3); *Lake Butler Apparel Co.* v. *Secretary*, 519 F. 2d 84, 88 (C.A. 5).

[18] Moreover, this case does not involve the circumstances that this Court identified in *Camara* and *See* as indicating that warrantless inspections are unreasonable under the Fourth Amendment in particular situations—blanket authorizations to inspect, lack of notice regarding the inspection's lawful purpose or scope, and the absence of any indication that a warrant requirement would significantly hamper regulation.

[19] *Brennan* v. *Buckeye Industries*, 374 F. Supp. 1350 (S.D. Ga.); *Dunlop* v. *Able Contractors*, Civ. No. 75-57-BLG (D. Mont., December 15, 1975), appeal pending, C.A. 9, No. 76-1615. Contra, *Brennan* v. *Gibson's Productions, Inc. of Plano*, 407 F. Supp. 154, 162-163 (E.D. Tex.) (three-judge court), appeal pending, C.A. 5, No. 76-1526; *Dunlop* v. *Hertzler Enterprises*, 418 F. Supp. 627 (D. N.Mex.) (three-judge court), appeal pending, C.A. 10, No. 76-2020; *Usery* v. *Rupp Forge Co.*, No. C-76-385 (N.D. Ohio, April 22, 1976, appeal pending, C.A. 6, No. 76-1960; *Usery* v. *Centrif-Air Machine Co.*, No. C-76-1551 (N.D. Ga., January 10, 1977).

[20] *United States* v. *Business Builders, Inc.*, 354 F. Supp. 141, 143 (N.D. Okla.) (Food, Drug and Cosmetic Act); *Youghiogheny and Ohio Coal Co.* v. *Morton*, 364 F. Supp. 45 (S.D. Ohio) (Coal Mine Health and Safety Act of 1969); *United States ex rel. Terraciano* v. *Montanye*, 493 F. 2d 682, 684-685 (C.A. 2), certiorari denied *sub nom. Terraciano* v. *Smith*, 419 U.S. 875 (state narcotics statute); *United States*

2. Even if, despite our contrary submission, this Court should conclude that the Fourth Amendment precludes warrentless safety inspections of working areas, the district court erred in declaring 29 U.S.C. 657(a) "unconstitutional and void" and enjoining the Secretary from "acting or attempting to act pursuant to or in furtherance of" that Section (App. B, *infra*, pp. 11a-12a). It should instead have followed this Court's rule that "under familiar principles of constitutional adjudication, our duty is to construe the statute, if possible, in a manner consistent with the Fourth Amendment," *Almeida-Sanchez* v. *United States*, *supra*, 413 U.S. at 272, and interpreted the statute to meet Fourth Amendment requirements.[21] Although, as noted, we believe it is clear that Congress intended to authorize warrantless inspections, it is equally clear that interpreting the statute to meet Fourth Amendment requirements more closely approximates congressional intent than totally eliminating the authority to inspect. Cf. *Tilton* v. *Richardson*, 403 U.S. 672, 684.

3. The uncertainty concerning the Secretary's authority to conduct OSHA inspections is seriously hampering the enforcement of that Act. Accordingly, the Secretary urges that this case be considered on an

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v. *Del Campo Baking Mfg. Co.*, 345 F. Supp. 1371, 1374-1377 and nn. 12-15 (D. Del.) (Food, Drug and Cosmetic Act); *United States* v. *Western & A. R. R.*, 297 Fed. 482, 484-485 (N.D. Ga.) (Railroad Safety Appliance Act).

[21] This is the course followed by the other district courts that have found warrantless OSHA inspections unconstitutional. See note 19, *supra*.

expedited schedule that will permit a final decision this Term. To that end, the government will file its brief on the merits by March 15, 1977, and we suggest that if the Court notes probable jurisdiction, the appellees be ordered to file their brief in response no later than April 14, 1977. The case would then be ready for argument during the April Session of the Court.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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FEBRUARY 1977.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 1-76-3

(Three-Judge Court)

BARLOW'S, INC., an Idaho corporation, PLAINTIFF

v.

W. J. USERY, Secretary of Labor of the United States of America, in his official capacity, ET AL., DEFENDANTS

MEMORANDUM DECISION AND ORDER

Before: KOELSCH and ANDERSON, Circuit Judges, and MCNICHOLS, Chief District Judge.

ANDERSON, Circuit Judge:

Plaintiff is an Idaho corporation in good standing situated in Pocatello, Idaho. Its business is the installation of electrical and plumbing fixtures, heating and air conditioning units. The corporation is engaged in interstate commerce in that it purchases and uses materials such as sheet metal which are made without the State of Idaho.

On September 11, 1975, Occupational Safety and Health Compliance Officer Daniel T. Sanger arrived at plaintiff's business premises for the purpose of conducting a safety and health inspection pursuant to Section 8(a) of the Occupational Safety and

Health Act. 29 U.S.C. § 657(a).[1] Mr. Sanger properly identified himself and requested permission to inspect the nonpublic area of the premises. Mr. Ferrol G. "Bill" Barlow, President and Manager of Barlow's, Inc., refused to allow the inspection, basing his refusal on the absence of a search warrant. It is undisputed that Mr. Sanger did not have any cause, probable or otherwise, to believe a violation existed nor was he in possession of any complaints by any employee of Barlow's, Inc.

As a result of Mr. Barlow's refusal, the Secretary petitioned this court on December 13, 1975, for an order compelling entry, inspection and investigation. A show cause order was thereafter issued and subsequent to the show cause hearing the Secretary's petition was granted on December 30, 1975.

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[1] 29 U.S.C. § 657(a) states:

"(a) In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—

(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee."

On January 5, 1976, the court's order was presented to Mr. Barlow. Mr. Barlow again declined to permit the inspection. The next day the plaintiff filed the instant action requesting that a three-judge court be convened to enjoin the enforcement of the Act on the ground of repugnance to the Fourth Amendment and, further, requesting a temporary restraining order. The present three-judge court[2] was empaneled and the temporary restraining order was denied on the ground of an inadequate showing of immediate and irreparable injury.

This case squarely presents the issue of whether the entry and inspection provisions of the Occupational Safety and Health Act (OSHA), 29 U.S.C. § 651, et seq., are consistent and compatible with the dictates of the Fourth Amendment.[3]

I.

Preliminarily, the Secretary advances two grounds to preclude this panel from reaching a decision on

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[2] During the pendency of these proceedings Judge Koelsch took senior status and Judge Anderson was elevated from district judge to circuit judge and continues to participate in this matter by designation of the Chief Judge of the Ninth Circuit.

[3] AMENDMENT IV—SEARCHES AND SEIZURES

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

the merits. First, it is contended that this court lacks subject matter jurisdiction. This argument is premised on two principles: First, that judicial review is improper because Congress has designated an exclusive forum—the Occupational Safety and Health Administration, and, second, that plaintiff is not entitled to challenge agency action for a supposed or threatened injury until prescribed administrative proceedings have been exhausted. In short, the Secretary contends that plaintiff should simply have permitted a full inspection under protest, thereby preserving its objections for the Commission and appellate courts, if and when a citation resulting from the inspection is actually issued against it.

The purposes served by the exhaustion doctrine, as set forth in *McKart* v. *United States*, 395 U.S. 185 (1969), are absent from this case and we therefore will not apply the rule to this case. It is beyond question that the administrative channels of OSHA lack the expertise to consider and determine the constitutional question presented by this case. We also find, after a consideration of the factors set forth in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), that the issue presented by this case is ripe for judicial determination. The issue presented is one of constitutional law only and, further, the plaintiff is placed in a dilemma of being forced to give up his asserted right of privacy or potentially finding himself in contempt of court. We therefore reject the secretary's contention that this court lacks subject matter jurisdiction.

The Secretary's second ground urged in support of dismissal is that plaintiff's failure to appeal the order of December 30, 1976, requiring the inspection bars the present action on res judicata grounds. Our review of the transcript of that hearing convinces us that the presiding judge reserved the constitutional issue on the basis that it was premature. The ruling in that case, Civil 4-75-58, clearly left open the door for subsequent litigation of the Fourth Amendment claim. We thus proceed to the merits.

II.

In *Frank* v. *Maryland*, 359 U.S. 360 (1959), the Supreme Court upheld the conviction of Aaron D. Frank who refused to permit a Baltimore City health inspector to enter and inspect his premises without a search warrant. This holding was expressly overruled by the Supreme Court in *Camara* v. *Municipal Court of San Francisco*, 387 U.S. 523 (1967) and its companion case, *See* v. *City of Seattle*, 387 U.S. 541 (1967). In *Camara* appellant was awaiting trial on criminal charge of violating the San Francisco Housing Code by refusing to give permission to a city housing inspector who sought to inspect appellant's residence without a warrant. The court, in tracing the history and scope of the Fourth Amendment, stated:

> "Nevertheless, one governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreason-

able' unless it has been authorized by a valid search warrant." 387 U.S. at 528-29 [citations omitted].

The court went on to hold that under the Fourth Amendment a person has the constitutional right to insist that a search warrant be obtained before an administrative inspection of a private residence is allowed.

In *See, supra*, the court was faced with a warrantless inspection of a commercial warehouse in the course of a municipal fire, health and housing program. In expanding its *Camara* holding to include commercial structures as well as private residences, the court stated:

"We therefore conclude that administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure." 387 U.S. at 545.

In *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970), the court narrowed the scope of its *Camara* holding in upholding the warrantless inspection of the premises of a retail dealer of liquor. In *United States* v. *Biswell*, 406 U.S. 311 (1972), the *Colonnade* reasoning was expanded to permit warrantless inspections of firearms dealers.

III.

It is upon the framework of the above-mentioned cases that we must base our decision. We reject the notion as espoused in *Brennan* v. *Buckeye Indus-*

tries, Inc., 374 F. Supp. 1350 (S.D. Ga. 1974), that the *Colonnade* and *Biswell* decisions envision a trend of the Supreme Court to generally narrow the holdings of *Camara* and *See*. Instead, we find that the warrantless inspection scheme pursuant to OSHA is more properly aligned with and must be controlled by the holdings in *Camara* and *See, supra*. See *Brennan* v. *Gibson's Products, Inc. of Plano*, 407 F. Supp. 154 (Three-judge court, E. D. Texas, 1976).

We simply cannot overlook the fact that in *Colonnade* and *Biswell* the court dealt with an "industry long subject to close supervision and inspection" (*Colonnade*, 397 U.S. at 77), and a "pervasively regulated business" (*Biswell*, 406 U.S. at 316). We believe that both of those cases fit into the *Camara* categorization of "certain carefully defined classes of cases." We have no such industry in this case. OSHA applies to all businesses that affect interstate commerce. 29 U.S.C. § 651(a)(3). As such, it applies to a wide variety of over 6,000,000 work places and does not focus on one particular type of business or industry. It cannot be questioned that this broad spectrum of businesses can be distinguished from the heavily-regulated liquor and firearm industries encountered in *Colonnade* and *Biswell, supra*.[4]

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[4] The Congressional investigations revealed in the legislative history of the Act (3 U.S. Code Congressional and Administrative News, 91st Congress, Second Session, 1970, p. 5177, et seq.) make a persuasive case for "need" in the health and safety fields. We, of course, do not sit in judgment of the wisdom of Congress. Our only concern is the alleged affront to the Fourth Amendment. The rationale of an anonymous

We have also had the benefit, not enjoyed by the court in *Brennan* v. *Buckeye Industries, Inc., supra,* of recent Supreme Court pronouncements which show a continued allegiance to the *Camara* and *See* holdings as expressing the court's views on the scope of the Fourth Amendment. In *Almeida-Sanchez* v. *United States,* 413 U.S. 266 (1973), the court was faced with a statute and regulations which permitted warrantless searches for aliens, without probable cause, within a one hundred mile zone along the international border. The court invalidated these roving searches by the Immigration and Naturalization Service, finding that such searches:

> "embodied precisely the evil the court saw in *Camara* when it insisted that the 'discretion of the official in the field' be circumscribed by obtaining a warrant prior to the inspection." 413 U.S. at 270.

The court went on to distinguish *Colonnade* and *Biswell* by noting that "businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade, . . ." 413 U.S. at 271.

More recently, in *Air Pollution Variance Board* v. *Western Alfalfa Corp.*, 416 U.S. 861 (1974), an inspector of the Colorado Department of Health conducted daylight visual pollution tests of smoke being emitted from the company's chimney. The inspector had entered the outdoor premises of the business without the owner's consent or having obtained a search warrant. The court expressly reaffirmed the holdings of *Camara* and *See*, but held them inapplicable to the case because of the "open fields" doctrine. See *Hester* v. *United States*, 265 U.S. 57 (1924).

There is one common thread among these cases that requires the result we reach here. In *Camara*, *See* and *Western Alfalfa*, *supra*, each was involved with statutory and regulatory schemes aimed at promoting and protecting public health and safety. The warrantless inspections authorized under OSHA likewise seek to promote public health and safety and therefore must be controlled by *Camara* and *See*.

The analysis which we have outlined above is consistent with that taken by another three-judge panel in *Brennan* v. *Gibson's Products, Inc. of Plano, supra.* While we adopt, in general, the similar reasoning

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saying "Expediency is the argument of tyrants, it precedes the loss of every human liberty" seems of foreceful application here. That the end result may be laudable and desirable does not justify the means used to accomplish it when constitutional prohibitions are confronted. To paraphrase Burke, *Impeachment of Warren Hastings,* February 16, 1788; "The Constitution (law) and arbitrary power are in eternal omnity." We suggest that there are other less intrusive and oppressive methods of accomplishing the intended result, e.g., employer reporting requirements with provisions for employee contribution and participation; employer-employee safety committees; encouragement of employee complaints; in the organized management-labor relations field a greater and more forceful input by labor unions as the safety representative of their members; efforts toward better enforcement by the states of their health and safety laws, etc. We subscribe to the *Camara* court holding that warrantless inspections must be confined to "certain carefully defined classes of cases." *Camara, supra,* p. 528-9.

employed there, we decline the invitation to judicially redraft an enactment of Congress. Unlike the *Gibson's Products* court, we cannot accept the proposition that the language of the OSHA inspection provisions envision the requirement that a warrant be obtained before any inspection is undertaken. Certainly, Congress was able, had it wished to do so, to employ language declaring that a warrant must first be obtained, the procedures under which it is to be obtained, and other necessary regulations. Congress did not do so and we refuse to accept that duty.

IV.

We therefore hold that the inspection provisions of OSHA which have attempted to authorize warrantless inspections of those business establishments covered by the Act, are unconstitutional as being violative of the Fourth Amendment.

IT IS SO ORDERED and judgment shall be entered accordingly.

DATED this 30th day of December, 1976.

/s/ M. Oliver Koelsch per JBA
M. OLIVER KOELSCH
Senior Circuit Judge

/s/ J. Blaine Anderson
J. BLAINE ANDERSON
United States Circuit Judge

/s/ Ray McNichols per JBA
RAY MCNICHOLS, Chief
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 1-76-3

(Three-Judge Court)

BARLOW'S, INC., an Idaho corporation, PLAINTIFF

vs.

W. J. USERY, Secretary of Labor of the United States of America, in his official capacity, ET AL., DEFENDANTS

SUMMARY JUDGMENT

The cross motions of the parties for summary judgment having been heard and submitted and the court having heretofore entered its memorandum decision and order, and it appearing that there are no genuine material issues of fact and that the record in this cause presents only questions of law, and the court having concluded that plaintiff is entitled to the relief prayed for in its complaint on file herein,

IT IS HEREBY ORDERED, ADJUDGED and DECLARED as follows:

I.

That Section 8(a) of Public Law 91-596, December 29, 1970, 84 Stat. 1598 (29 U.S.C. 657(a)), is unconstitutional and void in that it directly offends

against the prohibitions of the Fourth Amendment of the Constitution of the United States of America.

II.

That defendant, the Secretary of Labor of the United States of America, and all other defendants, and their successors in office, and all other persons acting by, through or under them, are hereby forever and permanently RESTRAINED and ENJOINED from acting or attempting to act pursuant to or in furtherance of Section 8(a) of OSHA (29 U.S.C. 657(a)) and from conducting or attempting to conduct any general searches or inspections of the non-public portions of the premises of the plaintiff herein pursuant to Section 8(a) of the Occupational Safety and Health Act of 1970.

III.

No costs or attorneys' fees are allowed.

DATED this 30th day of December, 1976.

/s/ M. Oliver Koelsch per JBA
M. OLIVER KOELSCH
Senior Circuit Judge

/s/ J. Blaine Anderson
J. BLAINE ANDERSON
Circuit Judge

/s/ Ray McNichols per JBA
Chief District Judge

APPENDIX C

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 1-76-3

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BARLOW'S, INC., an Idaho corporation, PLAINTIFF

vs.

W. J. USERY, Secretary of Labor of the United States of America, in his official capacity, ET AL., DEFENDANTS

NOTICE OF APPEAL

COME NOW the Defendants by and through the United States Attorney for the District of Idaho and pursuant to 28 U.S.C. 1252 and 1253 appeal to the

United States Supreme Court from the Memorandum Decision and Order and Summary Judgment entered on December 30, 1976, in the above-captioned matter.

WILBUR T. NELSON
United States Attorney

By /s/ Paul L. Westberg
PAUL L. WESTBERG
Assistant United States Attorney

[Filed January 4, 1977]

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 1-76-3

BARLOW'S, INC., an Idaho corporation, PLAINTIFF

vs.

W. J. USERY, Secretary of Labor of the United States of America, in his official capacity, ET AL., DEFENDANTS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is an employee in the Office of the United States Attorney for the District of Idaho and is a person of such age and discretion as to be competent to serve papers.

That on January 4, 1977, I Paul L. Westberg, served a copy of the Notice of Appeal on Runft and Longeteig, Attorneys at Law, 420 West Bannock Street, Boise, Idaho 83701 by depositing same in the United States mail at Boise, Idaho.

/s/ Paul L. Westberg
Assistant United States Attorney

Subscribed and sworn to before me this 4th day of January, 1977.

/s/ Mikel H. Williams
Notary Public
Residing at Boise, Idaho
My Commission expires:

☆ U. S. GOVERNMENT PRINTING OFFICE: 1977 226788 59